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No. 03-6821

In The Supreme Court of the United States

DAVID L. NELSON,

Petitioner,

v.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	13
ARGUMENT	16
I. SERIOUS CONSTITUTIONAL ISSUES MAY EMERGE CONCERNING THE PROCEDURE FOR PUTTING AN INDIVIDUAL CONDEMNED PRISONER TO DEATH – AS THEY EMERGED HERE – AFTER THAT PRISONER'S FEDERAL HABEAS CORPUS PROCEEDINGS HAVE BEEN COMPLETED	16
II. THE FAILURE TO PROVIDE ANY REMEDY FOR EIGHTH AMENDMENT VIOLATIONS IN THESE UNUSUAL SITUATIONS WOULD OFFEND LONGSTANDING TRADITIONS OF JUSTICE AND RAISE GRAVE CONSTITUTIONAL QUESTIONS THAT CAN READILY BE AVOIDED BY A PROPER INTERPRETATION OF THE APPLICABLE FEDERAL STATUTES	19

TABLE OF CONTENTS – Continued

	Page
III. UNDER A PROPER CONSTRUCTION OF 28 U.S.C. § 2244(b) AND 42 U.S.C. § 1983, A FEDERAL COURT DOES NOT INVARIABLY LOSE JURISDICTION TO ENTERTAIN AN OTHERWISE COGNIZABLE § 1983 ACTION SIMPLY BECAUSE THE PLAINTIFF HAS PREVIOUSLY SOUGHT FEDERAL HABEAS CORPUS RELIEF ON UNRELATED GROUNDS	24
IV. WHEN A PREVIOUSLY UNAVAILABLE CLAIM THAT DOES NOT INVALIDATE A CONVICTION OR SENTENCE IS OTHERWISE COGNIZABLE UNDER § 1983 – AS IS MR. NELSON'S – A FEDERAL COURT IS NOT JURISDICTIONALLY BARRED FROM REVIEWING THE CLAIM SIMPLY BECAUSE THE CLAIMANT IS A PRISONER WHO HAS COMPLETED FEDERAL HABEAS CORPUS PROCEEDINGS	29
V. IF RECHARACTERIZATION OF MR. NELSON'S § 1983 COMPLAINT IS PROPER, THE COMPLAINT SHOULD BE ENTERTAINED AS A FEDERAL HABEAS CORPUS PETITION BY THE DISTRICT COURT WITH NO NEED FOR PRIOR AUTHORIZATION BY THE COURT OF APPEALS BECAUSE IT IS NOT A SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATION WITHIN THE MEANING OF 28 U.S.C. § 2244(b)	36
CONCLUSION	38

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 21

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) 21

Boyd v. United States, 304 F.3d 813 (8th Cir. 2002) 26

Bryan v. Moore, 528 U.S. 960 (1999) 17

Crowell v. Benson, 285 U.S. 22 (1932) 22

Dunlap v. Litscher, 301 F.3d 873 (7th Cir. 2002) 26

Dunn v. Cockrell, 302 F.3d 491 (5th Cir. 2002) 26

Duvall v. Keating, 162 F.3d 1058 (10th Cir. 1998) 34

Estelle v. Gamble, 429 U.S. 97 (1976) 30

Farris v. United States, 333 F.3d 1211 (11th Cir. 2003) 27

Felker v Turpin, 101 F.3d 657 (11th Cir. 1996) 27

Felker v. Turpin, 518 U.S. 651 (1996) 22, 25

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) 21

Fugate v. Dep't of Corr., 301 F.3d 1287 (11th Cir. 2002) 27

Furman v. Georgia, 408 U.S. 238 (1972) 16, 17

Gilreath v. State Bd. of Pardons and Paroles, 273 F.3d 932 (11th Cir. 2001) 28

Gitten v. United States, 311 F.3d 529 (2d Cir. 2002) 26

Gonzalez v. Sec'y for Dep't of Corr., 326 F.3d 1175 (11th Cir. 2003) 27

Gregg v. Georgia, 428 U.S. 153 (1976) 16

TABLE OF AUTHORITIES – Continued

Page

Heck v. Humphrey, 512 U.S. 477 (1994) 32, 33, 34

Hill v. Hopper, 112 F.3d 1088 (11th Cir. 1997) 27

Hope v. Pelzer, 536 U.S. 730 (2002) 16

Hutto v. Finney, 437 U.S. 678 (1978) 30

I.N.S. v. St. Cyr, 533 U.S. 289 (2001) 22

International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) 22

In re Kemmler, 136 U.S. 436 (1890) 16, 17

Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838) 21

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 22

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) 16

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 14, 21

In re Medina, 109 F.3d 1556 (11th Cir. 1997) 26, 27

Mobley v. Head, 306 F.3d 1096 (11th Cir. 2002) 27

Monell v. Dep't of Soc. Services, 436 U.S. 658 (1978) 31

Monroe v. Pape, 365 U.S. 167 (1961) 31

Nelson v. Alabama, 292 F.3d 1291 (11th Cir. 2002) 4

Nelson v. Campbell, 124 S. Ct. 383 (2003) 13

Nelson v. Campbell, 286 F. Supp. 2d 1321 (M.D. Ala. 2003) 1, 19, 20

Nelson v. Campbell, 347 F.3d 910 (11th Cir. 2003) ..... *passim*

Nelson v. Nagle, 995 F.2d 1549 (11th Cir. 1993) 4

TABLE OF AUTHORITIES – Continued

Page

Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998) 34

Preiser v. Rodriguez, 411 U.S. 475 (1973) 23, 24, 31, 32

In re Provenzano, 215 F.3d 1233 (11th Cir. 2000) 26, 29

Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999) 17

Rodwell v. Pepe, 324 F.3d 66 (1st Cir. 2003) 26

Rose v. Lundy, 455 U.S. 509 (1982) 28

Slack v. McDaniel, 529 U.S. 473 (2000) 28

Spivey v. State Bd. of Pardons and Paroles, 279 F.3d 1301 (11th Cir. 2002) 28, 34

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) ..... *passim*

Thompson v. Calderon, 151 F.3d 918 (9th Cir. 1998) 26

United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366 (1909) 22

United States v. C.I.O., 335 U.S. 106 (1948) 22

United States v. Castro, 124 S. Ct. 786 (2003) 22

United States v. Winestock, 340 F.3d 200 (4th Cir. 2003) 26

Wilkerson v. Utah, 99 U.S. 130 (1878) 16

Wilson v. United States Dist. Court for the N. Dist. of California, 161 F.3d 1185 (9th Cir. 1998) 34

Wolff v. McDonell, 418 U.S. 539 (1974) 32, 33, 34

Workman v. Bell, 227 F.3d 331 (6th Cir. 2000) 27

Ex parte Young, 209 U.S. 123 (1908) 21

Young v. Hayes, 218 F.3d 850 (8th Cir. 2000) 34

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1343 2

28 U.S.C. § 2241 2

28 U.S.C. § 2244(b) ..... *passim*

28 U.S.C. § 2254 3

42 U.S.C. § 1983 ..... *passim*

Ala. Code § 15-18-82.1 (2002) 4

Ala. Code §15-18-82 (1975) 5

MISCELLANEOUS

Frank H. Netter, M.D., *Atlas of Human Anatomy* (Arthur F. Dalley II, Ph.D., ed., 2d ed. 1997) 10

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Nelson v. Campbell*, 347 F.3d 910 (11th Cir. 2003). J.A. 118. The opinion of the United States District Court for the Middle District of Alabama is reported at *Nelson v. Campbell*, 286 F. Supp. 2d 1321 (M.D. Ala. 2003). J.A. 105.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on October 8, 2003. J.A. 118. A timely petition for rehearing *en banc* was denied on October 9, 2003. J.A. 129. The petition for writ of certiorari was filed on October 9, 2003, and was granted on December 1, 2003. J.A. 132. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life [or] liberty . . . without due process of law. . . .

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

28 U.S.C. § 2241 provides in pertinent part:

> (a) Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions.
>
> . . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> . . . .

> (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . .

28 U.S.C. § 2244(b) provides in pertinent part:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254 provides in pertinent part:

> (a) [A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

In 1994, David Nelson implored a Jefferson County, Alabama, trial jury and circuit court judge to sentence him to death.[1] As he requested, a death sentence was imposed. *Nelson v. Alabama*, 292 F.3d 1291, 1293-94 (11th Cir. 2002).

Mr. Nelson sought to waive his appeals and have an execution date set. *Id.* at 1294. After repeated remands in the Alabama courts as a result of a deficient sentencing order, Mr. Nelson's death sentence was affirmed on appeal. Mr. Nelson did not file an appeal brief in either the Alabama Court of Criminal Appeals or the Alabama Supreme Court. *Id.* He did subsequently challenge his death sentence in a federal habeas corpus application which was denied by the district court; and that court's ruling was affirmed by the Eleventh Circuit Court of Appeals on June 3, 2002. *Id.*

Throughout all of the foregoing proceedings, and as of the time of final disposition by the Eleventh Circuit of Mr. Nelson's single federal habeas corpus petition, the sole method of executing death sentences prescribed by Alabama law was electrocution. On July 1, 2002, the Alabama legislature changed the mode of execution from electrocution to lethal injection. ALA. CODE § 15-18-82.1 (2002).

On April 4, 2003, the Alabama Attorney General's office moved the Alabama Supreme Court to set an

[1] Mr. Nelson's 1980 capital murder conviction had been affirmed in a prior federal habeas corpus application but his death sentence had been reversed. *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993).

execution date for Mr. Nelson. J.A. 81. In response to this request, Mr. Nelson sent a letter to the Attorney General informing the State that Mr. Nelson had "no plans to contest your motion filed with the court," and "I conclude and agree with you that an execution date should be set promptly by the court in the immediate future." J.A. 89. On September 3, 2003, the Alabama Supreme Court scheduled Mr. Nelson's execution for October 9, 2003. Mr. Nelson was to be executed by lethal injection.

Mr. Nelson has severely compromised veins and has encountered repeated problems over the last two decades with prison medical personnel gaining venous access during routine physical examinations. J.A. 7. Prompted by concerns about Mr. Nelson's physical problems, counsel for Mr. Nelson contacted the Holman Correctional Facility Warden, Grantt Culliver, in August 2003.[2] Counsel informed Warden Culliver about these problems and expressed concern about the protocol for gaining venous access for the lethal injection procedure.[3] J.A. 25-26, 92.

Mr. Nelson's counsel requested that Warden Culliver permit either a private physician hired by Mr. Nelson or a

[2] Mr. Nelson was then housed at the William E. Donaldson Correctional Facility ("Donaldson") in Bessemer, Alabama, but was slated to be transferred from Donaldson to the Holman Correctional Facility ("Holman") in Atmore, Alabama, for execution. *See* ALA. CODE §15-18-82 (1975). Subsequent to the setting of Mr. Nelson's execution date by the Alabama Supreme Court on September 3, 2003, the transfer was made. J.A. 7.

[3] During this conversation, counsel also inquired about the possibility that Mr. Nelson could be electrocuted. Warden Culliver informed her that under state law Mr. Nelson no longer had the option of choosing electrocution instead of lethal injection. J.A. 92-93.

prison physician to examine and consult with Mr. Nelson regarding venous access for the lethal injection. J.A. 8. Alternatively, counsel requested that a private physician be permitted to consult with the prison medical personnel who would be performing any procedures necessary for venous access prior to the execution. J.A. 8-9. Warden Culliver assured Mr. Nelson's counsel that a physician would examine and consult with Mr. Nelson about the execution protocol after Mr. Nelson arrived at Holman for execution. J.A. 26. Counsel additionally requested a copy of the Alabama Department of Corrections' written protocol for execution procedures. J.A. 25-26. Warden Culliver refused to provide information about the execution protocol or about any medical procedure that would have to be performed to gain venous access to Mr. Nelson prior to the execution, including information about the "medical personnel" who would be present during the procedure and Mr. Nelson's execution. J.A. 25-26.

Mr. Nelson arrived at Holman Prison in September 2003, however he was never examined by a physician. J.A. 8. Instead, Warden Culliver and a prison nurse met with Mr. Nelson on two occasions. J.A. 11. During the first meeting, which occurred around September 10, 2003 – one month before Mr. Nelson's scheduled execution date of October 9 – Warden Culliver acknowledged that Mr. Nelson lacks superficial peripheral veins adequate to support an intravenous line and that a medical procedure would be necessary to gain venous access prior to the execution. J.A. 10.[4]

[4] The nurse reported to Warden Culliver that "Nelson did not have any veins in his lower arms and hands sufficient to support a direct intravenous line." J.A. 93.

Warden Culliver initially informed Mr. Nelson that in order to gain venous access, a half-inch incision would be made in Mr. Nelson's arm through which a catheter would be inserted into a vein. Mr. Nelson was informed that this procedure was to take place at least twenty-four hours prior to his execution. J.A. 11. On Friday, October 3, 2003 – less than a week before the execution was scheduled to occur – Warden Culliver informed Mr. Nelson and his counsel that the medical procedure that would be used to gain venous access prior to the lethal injection procedure would require not a half-inch incision, but rather a two-inch incision either in Mr. Nelson's leg or arm, with only a local anesthetic being used. J.A. 12, 54. Warden Culliver further informed Mr. Nelson that instead of being performed twenty-four hours prior to the execution, this procedure would begin one hour before the execution. J.A. 12. In describing the procedure to Mr. Nelson's counsel, Warden Culliver claimed that it was not a "cut-down" procedure. J.A. 12.

Mr. Nelson's execution was to be the first time the State of Alabama would ever undertake to perform a medical procedure prior to the execution in order to gain venous access.[5] J.A. 10. At no point prior to the filing of the present lawsuit did the State commit to using qualified medical personnel to perform the potentially dangerous procedure needed to gain venous access to Mr. Nelson,

[5] *See also Nelson v. Campbell*, 347 F.3d 910, 913 n.1 (11th Cir. 2003) (Wilson, J., dissenting) ("the procedure at issue here had never before been implemented in Alabama and prison officials had to craft a special procedure to govern Nelson's execution."). J.A. 124 n.1.

despite Mr. Nelson's requests for such assurance.[6] Prompted by growing concerns aroused by the increasingly apparent likelihood that the State of Alabama had no written medical procedures for gaining venous access prior to the execution of a condemned inmate, on Friday, October 3, 2003, Mr. Nelson's counsel again contacted the Department of Corrections, by both telephone and facsimile, in another effort to gain access to the State's protocol for the lethal injection procedure and the medical procedure that would have to be implemented to gain venous access to Mr. Nelson. J.A. 27. On Friday, October 3, 2003, this request was once again denied. J.A. 28.

On the following Monday, October 6, 2003, Mr. Nelson filed the present legal action pursuant to 42 U.S.C. § 1983 to challenge the State's employment of an invasive, painful and unnecessarily torturous medical procedure to gain venous access prior to the lethal injection. Mr. Nelson alleged that the State's refusal to disclose the Alabama Department of Corrections' written protocol for gaining venous access prior to his execution, combined with the State's proposed method for gaining access to his veins to administer the lethal injection, violated his right to be free from cruel and unusual punishment under the Eighth Amendment. J.A. 5-23. Mr. Nelson sought an order staying his execution, requiring the defendants to provide him with the protocol that they intended to follow, and directing the defendants to "promulgate a protocol concerning

[6] Even after the lawsuit had been filed, the State continued to assert – at a hearing in the district court – that "there's no Constitutional requirement that the prisons use a doctor" to perform this medical procedure. J.A. 58.

venous access that comports with contemporary standards of medical care and the Eighth Amendment to the United States Constitution." J.A. 22.

As is evident from counsel's assertions in the district court, Mr. Nelson's challenge was not to lethal injection as a method of execution, but was limited instead to "how the State of Alabama at the present time intends to to [sic] have venous access on Mr. Nelson." J.A. 69. Mr. Nelson was not "asking ultimately for his execution to be stopped in this suit." J.A. 70. Indeed, counsel agreed that, if the challenge were successful, "all it's going to do is to provide Mr. Nelson with a procedure prior to his execution that meets the Eighth Amendment." J.A. 70.

In response to Mr. Nelson's lawsuit, counsel for the defendant state officials ("the State") acknowledged that "the protocol that is going to be planned for this execution is a little different than the ones that we've had. . . . " J.A. 51. The State's counsel assured the district court that the affidavit of Warden Culliver "outlines that particular protocol" to be employed. J.A. 58. In the district court, the Warden and the State's expert asserted that if venous access could not be obtained in the upper thigh, an attempt would be made to "attach a direct intravenous line to the external carotid vein located in the neck." J.A. 93, 91. If this failed, the State proposed making a two-inch incision in the front part of the arm in order to "isolate and dissect the saphenous vein. . . . " J.A. 91, 93. However, as Mr. Nelson's medical expert – a licensed physician and board-certified practicing anesthesiologist and assistant professor of clinical anesthesiology at Columbia University College of Physicians and Surgeons – reported to the court by affidavit, humans do not *have* an external carotid vein

in the neck.[7] And it is common medical knowledge that the saphenous vein is not located in the arm but in the leg.[8]

The State now described its proposed approach as including a possible "cut-down" procedure. J.A. 87, 91. It said that it would use only a local anesthetic during the "cut-down." J.A. 87, 91. Mr. Nelson, in turn, presented an affidavit from a medical expert explaining that the "cut-down" procedure is an invasive surgical procedure which, when performed without access to "proper medical equipment and supplies" and without the attendance of "experienced and competent assistance" would be intolerably painful and dangerous. J.A. 34-36. When performed in an attempt to gain venous access in a patient with whom peripheral intravenous access attempts have failed, in the manner proposed by the State, the "cut-down" procedure does not comport with contemporary standards of medical care. J.A. 37. The procedure involves making a series of sharp surgical incisions through the skin, the underlying connective tissue, and layers of fat and muscle, until the region surrounding the large vein is reached. J.A. 31, 36. Mr. Nelson's expert explained, the "cut-down" procedure that the State proposed performing utilizing only a local anesthetic is "usually performed under deep sedation . . . because it would otherwise be an extraordinarily disturbing and distressing experience." J.A. 32. In Mr. Nelson's case, a "cut-down" procedure performed on his arm would likely be "technically challenging and painful," and

[7] "The 'external carotid vein' does not exist in human beings." J.A. 99.

[8] Frank H. Netter, M.D., *Atlas of Human Anatomy* 510 (Arthur F. Dalley II, Ph.D., ed., 2d ed. 1997).

ultimately "ineffective," because the veins in his arm are likely "scarred and/or thrombosed (occluded by clot)." J.A. 101.

Complications of the "cut-down" procedure are well-recognized and include severe hemorrhage and pneumothorax, which is the entry of air into the potential space between the lungs and the inner wall of the chest and carries the potential for death by asphyxia and cardiovascular collapse. Other complications include cardiac dysrhythmia, an abnormality of the electrical activity of the heart which can lead to shock with accompanying severe chest pain, nausea, and vomiting. "Cut-downs" can also be extremely painful. J.A. 34-36. The likelihood of these complications occurring substantially increases when the procedure is performed by personnel who are not well experienced in such techniques. Any plan that involves subjecting an individual to a "cut-down" procedure in the hands of inexperienced personnel would represent a clear risk of a "medical misadventure and a botched outcome." J.A. 33.[9]

Federal District Court Judge Myron Thompson acknowledged that Mr. Nelson's challenge to the medically inept and dangerous surgical procedure which the State intended to employ constituted a valid Eighth Amendment claim. J.A. 113. But Judge Thompson nevertheless dismissed the lawsuit for lack of jurisdiction on the ground

[9] A "cut-down" procedure also requires proper equipment both to perform the procedure and to treat the potential complications, including (but not limited to) suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors and equipment, and a defibrillator. J.A. 34-36.

that "binding Eleventh Circuit Court of Appeals case law" required him to treat Mr. Nelson's § 1983 complaint as the functional equivalent of a habeas corpus petition. The court declined to assert jurisdiction because Mr. Nelson had previously filed a federal habeas corpus petition and had not sought permission from the court of appeals to file a successive habeas corpus petition under 28 U.S.C. § 2244(b)(3)(A). J.A. 110-12.

On appeal, the Eleventh Circuit Court of Appeals affirmed the jurisdictional dismissal on October 8, 2003, a day before Mr. Nelson's scheduled execution. J.A. 122. The panel majority reasoned:

> Because Nelson's § 1983 claim was the "functional equivalent" of a second habeas petition and because Nelson did not get our permission to file a second habeas petition prior to filing in the district court as required by 28 U.S.C. § 2244(b)(3)(A), the district court properly dismissed Nelson's § 1983 claim for lack of jurisdiction to entertain the claim. . . . Moreover, even had Nelson sought our permission to file a second habeas petition, the facts alleged indicate that Nelson's application would have been denied pursuant to 28 U.S.C. § 2244(b)(2) because his cruel and unusual punishment claim neither "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," nor has a "factual predicate for the claim [that] could not have been discovered previously through the exercise of due diligence . . . [that] if proven and viewed in light of the evidence as a whole, would be sufficient to establish . . . that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

(citations omitted). J.A. 121-22. Circuit Judge Charles R. Wilson dissented, emphasizing that Mr. Nelson was not challenging his *sentence*, because his sentence was "death by lethal injection, not by lethal injection subject to any painful secondary procedure that Alabama state prison officials deem appropriate." J.A. 125. Therefore, Judge Wilson reasoned that Mr. Nelson's § 1983 claim is not the functional equivalent of a habeas corpus petition, because it "has no bearing on his conviction or his sentence, nor will it ever." J.A. 127.

On October 9, 2003, Mr. Nelson sought and was denied rehearing *en banc*, J.A. 129-30, and petitioned this Court for a writ of certiorari and a stay of execution. The Court stayed Mr. Nelson's imminent execution, *Nelson v. Campbell*, 124 S. Ct. 383 (2003), and on December 1, 2003, granted certiorari limited to the question whether a death row inmate's § 1983 action should be treated as a habeas corpus petition subject to the procedures required for filing successive petitions under 28 U.S.C. § 2244(b)(3)(A). J.A. 132-33.

SUMMARY OF THE ARGUMENT

The Eighth Amendment prohibits the unnecessary and wanton infliction of pain. It permits sentences of death to be carried out, but not in a manner that is more torturous than necessary to extinguish life. As in Mr. Nelson's case, the fact that a proposed means of execution may cause an individual condemned prisoner to suffer needless torment in violation of the Eighth Amendment

may occasionally come to light after the prisoner has completed federal habeas corpus litigation. The successive-application bar of 28 U.S.C. § 2244(b) does not preclude a federal judicial remedy for such Eighth Amendment violations.

Some remedy for injurious violations of the Constitution must be made available if constitutional rights are to be preserved and given any meaningful existence. The failure to provide any remedy for an Eighth Amendment violation would offend longstanding traditions of justice and raise grave constitutional questions. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). This Court should not sanction a construction of the relevant federal statutes to produce such a result, particularly when there is nothing in the text of the statutes that would support it.

Although there is no basis in statute or in this Court's caselaw, the Eleventh Circuit has embraced an approach that forecloses all forms of relief for a condemned prisoner who seeks to avert a torturous method of execution that is first proposed after the prisoner has completed a federal habeas corpus proceeding, even where the federal action the prisoner then files does not challenge the underlying conviction or sentence and could not previously have been brought. Applying this Eleventh Circuit rule, the federal district court and the court of appeals below improperly concluded that because Mr. Nelson filed the present lawsuit and request for a preliminary injunction after the end of his federal habeas corpus proceedings, his § 1983 claim constituted the "functional equivalent" of a successive habeas corpus petition and was jurisdictionally barred by the preclusion rules of 28 U.S.C. § 2244(b).

The Eleventh Circuit's shielding of unconstitutional conduct from redress by an unsupported reading of § 2244(b) misconstrues the text and purpose of the statute and ignores this Court's applicable precedent. This Court has held specifically that a lawsuit limited to claims arising for the first time out of the circumstances of a death-sentenced inmate's imminent execution – claims that were premature and unfit for adjudication until just before the execution is carried out – does not constitute a "second or successive" habeas corpus application for purposes of § 2244(b) when it is filed after the denial of habeas corpus relief on an earlier petition challenging the underlying conviction and sentence. *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). Because Mr. Nelson is not repetitively or belatedly challenging the legality of his conviction or sentence or seeking relief from either of them, the Eleventh Circuit below erred in treating his § 1983 action as a successive habeas corpus application that had to satisfy § 2244(b)'s gatekeeping requirements for successive petitions, rather than determining whether he satisfied the requirements for stating a § 1983 claim. Mr. Nelson did not ask the courts below and is not asking this Court to prevent his execution. He asks only that the respondent Alabama prison officials be enjoined from torturing him in the process, in violation of the Eighth Amendment. That prayer for relief is squarely within federal § 1983 jurisdiction.

However, even if this Court concludes that the specific form of relief pleaded by Mr. Nelson, an injunctive action under 42 U.S.C. § 1983, is an inappropriate vehicle for raising legitimate time-sensitive Eighth Amendment violations threatened by an unusual execution procedure, it should allow Mr. Nelson to raise those claims in another

form, so that basic constitutional rights are not left unprotected empty promises.

ARGUMENT

I. SERIOUS CONSTITUTIONAL ISSUES MAY EMERGE CONCERNING THE PROCEDURE FOR PUTTING AN INDIVIDUAL CONDEMNED PRISONER TO DEATH – AS THEY EMERGED HERE – AFTER THAT PRISONER'S FEDERAL HABEAS CORPUS PROCEEDINGS HAVE BEEN COMPLETED.

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 392 (1972)). This Court has long held that the Amendment protects prisoners from "the gratuitous infliction of suffering." *Gregg*, 428 U.S. at 183 (citing *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878) and *In re Kemmler*, 136 U.S. 436, 447 (1890));[10] *see also Hope v. Pelzer*, 536 U.S. 730, 738 (2002). In the capital punishment context specifically, this Court has upheld unique execution procedures that raise unusual issues of potential cruelty only after specifically finding that "[t]here is no purpose to inflict unnecessary pain ... in [a] proposed execution." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947). Where the measure of pain inflicted in executing a condemned

[10] "[P]unishments of torture ... and all others in the same line of unnecessary cruelty, are forbidden by ... [the Eighth A]mendment." *Wilkerson*, 99 U.S. at 136. "Punishments are cruel when they involve torture or a lingering death...." *Kemmler*, 136 U.S. at 447.

prisoner results from an unusual circumstance that involves "something more than the mere extinguishment of life," the Eighth Amendment's prohibition against cruel and unusual punishment is obviously implicated. *See Furman*, 408 U.S. at 265 (quoting *Kemmler*, 136 U.S. at 447).

Occasionally, the circumstances giving rise to a constitutional claim of unusual cruelty in the means proposed for conducting an execution do not emerge until shortly before the execution – which will ordinarily be after the condemned prisoner has completed federal habeas corpus proceedings. For example, in Florida, after electrocuted prisoners caught on fire, were burned and charred, and bled excessively during executions, this Court granted certiorari to review the constitutionality of the procedures involved in using Florida's electric chair. *See Bryan v. Moore*, 528 U.S. 960 (1999), *cert. dismissed*, 528 U.S. 1133 (2000) (dismissing the writ after Florida amended its execution procedures to provide an alternative method of execution); *Provenzano v. Moore*, 744 So. 2d 413, 431-36 (Fla. 1999) (Shaw, J., dissenting) (describing the executions of three Florida prisoners), *cert. denied*, 528 U.S. 1182 (2000). By the time of *Bryan*, it had become apparent that Florida's condemned prisoners – both those who had completed federal habeas corpus proceedings and those who had not – alike faced the possibility of unexpectedly torturous and needlessly painful executions raising serious constitutional concerns that merited federal court review.[11]

[11] The execution of Jimmy Lee Gray in Mississippi similarly exposed the existence of previously unperceived but significant constitutional

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Mr. Nelson's case represents an extreme instance of this plight. His federal habeas corpus petition was denied by the district court on August 18, 2000, and its denial was affirmed by the Eleventh Circuit on June 3, 2002. At that time, death sentences in Alabama were carried out by electrocution. On July 1, 2002, Alabama replaced the electric chair with lethal injection as the State's method of execution. It was not until September 2003, when Mr. Nelson was brought to Holman Prison to be executed, that the warden in charge of his execution began making plans for ways to accomplish the injection despite the inaccessibility of Mr. Nelson's veins. And it was only during the days immediately preceding Mr. Nelson's scheduled execution date of October 9, 2003, that the warden finally disclosed his plans, and Mr. Nelson learned that they involved the performance of potentially excruciating surgery – a medically ill-defined and inappropriate "cut-down" procedure – which would be conducted without qualified personnel, proper equipment, or adequate anesthesia. Then, when Mr. Nelson filed a civil rights complaint seeking to enjoin this "cut-down"

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claims. During his execution by gas, prison officials were forced to clear the room after Mr. Gray's desperate gasps for air during the procedure repulsed witnesses. *See* Dan Lohwasser, United Press International, Domestic News, September 2, 1983, *available in* LEXIS, Nexis Library, UPI File. A reporter who witnessed the execution stated that over the course of eight minutes, Mr. Gray's "head dropped and he appeared dead, but each time it snapped up, striking with an audible clang a steel pole running from floor to ceiling behind his seat." *Id.* "I thought I had some pretty hard bark on me from being in Vietnam, but I was pretty shook up. There was a steel pole running from the floor to the ceiling behind Gray's chair, and we watched him slam his head into the pole for eight minutes as hard as he could." *See* Eileen Keerdoja, *A "Civilized" Way to Die?*, Newsweek, Apr. 9, 1984, at 106.

procedure as a violation of the Eighth Amendment, the courts below concluded that they had no jurisdiction to hear such a claim, because his lawsuit had to be treated as a habeas corpus petition and would constitute Mr. Nelson's "second" habeas corpus petition, whereas 28 U.S.C. § 2244(b) limits prisoners in Mr. Nelson's situation to just one.

II. THE FAILURE TO PROVIDE ANY REMEDY FOR EIGHTH AMENDMENT VIOLATIONS IN THESE UNUSUAL SITUATIONS WOULD OFFEND LONGSTANDING TRADITIONS OF JUSTICE AND RAISE GRAVE CONSTITUTIONAL QUESTIONS THAT CAN READILY BE AVOIDED BY A PROPER INTERPRETATION OF THE APPLICABLE FEDERAL STATUTES.

In Mr. Nelson's § 1983 case, the district court forthrightly described the consequences of the "binding Eleventh Circuit"[12] rule that it felt compelled to follow in recharacterizing his § 1983 complaint as a habeas corpus petition in order to dismiss it as a "second . . . application"[13] for the writ forbidden by 28 U.S.C. § 2244(b):

> The court recognizes that the import of the dismissal of this lawsuit is that Nelson will be effectively left without a federal forum for review of his Eighth Amendment claim.
>
> . . . .
>
> The rule that a § 1983 action seeking a stay of execution must be treated as a habeas petition

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[12] *Nelson v. Campbell*, 286 F. Supp. 2d 1321, 1324 (M.D. Ala. 2003).

[13] *Id.* at 1324 n.13.

> means that, after a death row inmate has filed his first federal habeas petition, he can never obtain a stay of execution from a federal court so that court can review . . . an Eighth Amendment claim regarding any later decision as to how the execution is to be carried out. The rule means that no matter how meritorious Nelson's claim is, and despite the fact that he could not raise his claim in his earlier habeas petition, there seems to be no way for him to obtain federal relief now.

Nelson v. Campbell, 286 F. Supp. 2d at 1325. The Eleventh Circuit's affirmance of the district court relied upon this rule – that any federal action instigated by a death row prisoner to challenge violations of constitutional rights that occur after the close of his initial federal habeas corpus proceedings must be construed as a successive habeas corpus petition.[14]

As the district court plainly (though politely) implies, such a result is refractory to reason. It is also radically at odds with the fundamental tenet of the Anglo-American

[14] The Eleventh Circuit determined that:

> [b]ecause Nelson's § 1983 claim was the functional equivalent of a second habeas petition and because Nelson did not get our permission to file a second habeas petition prior to filing in the district court as required by 28 U.S.C. § 2244(b)(3)(A), the district court properly dismissed Nelson's § 1983 claim for lack of jurisdiction to entertain the claim. Moreover, even had Nelson sought our permission to file a second habeas petition, the facts alleged indicate that Nelson's application would have been denied pursuant to 28 U.S.C. § 2244(b)(2). . . .

Nelson v. Campbell, 347 F.3d 910, 912 (11th Cir. 2003) (citations and internal quotations omitted).

legal tradition expressed in the maxim *ubi jus, ubi remedium* – where there's a right there's a remedy – a maxim classically viewed as central to the rule of law. Chief Justice Marshall in *Marbury v. Madison* quoted Blackstone[15] for the proposition that "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded,'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803);[16] and the Chief Justice added that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*

This is neither a transitory nor a parochial notion.[17] It goes to the heart of due process.[18] To deprive an individual

[15] 3 WILLIAM BLACKSTONE, COMMENTARIES *23.

[16] *See also, e.g., Ex parte Young*, 209 U.S. 123, 165 (1908); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); *Alden v. Maine*, 527 U.S. 706, 811-12 (1999) (dissenting opinion of Justice Souter). In *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66-67 (1992), the Court, after quoting *Marbury*'s reference to Blackstone, added that "it has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist." *Id.* at 67 (quoting *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838)).

[17] *See, e.g.*, Article XVIII of the American Declaration of the Rights and Duties of Man:

> *Article XVIII*: Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

[18] Again in Chief Justice Marshall's words in *Marbury*, 1 Cranch at 163:

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of recourse to a forum necessary for the vindication of his or her rights and to do so arbitrarily, on the basis of an accident of timing over which she or he had no control, would violate due process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). To construe a statute as having this perverse effect and to do so "without any clear indication that such was Congress' intent,"[19] would create unnecessary and serious constitutional problems under the Due Process Clause; and to construe a silent habeas corpus statute in this manner would create serious Suspension Clause problems as well.[20] The Court does not read statutes in this manner.[21]

Here there is no need or reason whatsoever to do so. The Eleventh Circuit has turned 28 U.S.C. § 2244(b) on its

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> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

[19] *United States v. Castro*, 124 S. Ct. 786, 791 (2003).

[20] *See I.N.S. v. St. Cyr*, 533 U.S. 289, 300-04 (2001). Because the present case does not involve the use of habeas corpus "to allow a final judgment of conviction in a state court to be collaterally attacked," *Felker v. Turpin*, 518 U.S. 651, 663 (1996), the Suspension Clause concern here, as in *St. Cyr* and *Felker*, does not require the Court to consider the vexed issue whether "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Id.* at 664.

[21] *See, e.g., United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909) (when a statute is subject to two interpretations, the construction that saves it from constitutional infirmity will be adopted); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (same); *United States v. C.I.O.*, 335 U.S. 106, 120-21 & n.20 (1948) (same); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961) (same).

head with no regard for its text, its manifest purpose, or this Court's prior construction of it. Congress enacted § 2244(b) to prevent state prisoners from using federal habeas corpus proceedings to attack their convictions or their sentences repetitiously or dilatorily. The Eleventh Circuit has converted § 2244(b) into a bar against the provision of *any* federal forum to a state prisoner who is *not* attacking either a conviction or a sentence but is seeking one and *only one* opportunity to present an Eighth Amendment claim of needless cruelty *at the first opportunity after the prisoner learns that a state prison official has decided to execute the sentence in a wantonly torturous manner.*

That this is a misconstruction of the statute is apparent from any fair reading of *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). This Court held in *Stewart* that a federal habeas corpus petition presenting claims arising in the first instance out of the circumstances of a death-sentenced inmate's imminent execution – claims that were premature and unfit for adjudication until just before the execution was carried out – is not a "second or successive" petition for purposes of § 2244(b) when filed by an inmate who has earlier litigated and lost a habeas corpus proceeding raising claims that challenged the validity of the underlying conviction and sentence. *Id.* at 644-45. *Stewart* establishes that even if Mr. Nelson had filed a document captioned as an application for a writ of habeas corpus, it would not have been "a second or successive habeas corpus application" within the meaning of § 2244(b). And this is relevant as well to his entitlement to proceed by way of a civil rights action under 42 U.S.C. § 1983, because the only conceivable bar to such a proceeding would be a drastic extension of the holding in *Preiser v. Rodriguez*, 411 U.S.

475 (1973), that certain sorts of claims should be pursued only through a habeas corpus petition, not under § 1983. But a major reason for that ruling in *Preiser* was to prevent state prisoners from using § 1983 actions to evade the procedural limitations of federal habeas corpus practice – such as, in the view of the court of appeals in the present case, § 2244(b)'s prohibition of most second and successive petitions. Conversely, if § 2244(b) as construed in *Stewart* would *not* bar Mr. Nelson from raising his Eighth Amendment challenge to the "cut-down" procedure in a habeas corpus proceeding, there is no reason to stretch *Preiser* to cover his case. Mr. Nelson discusses *Preiser* more fully in section III.A of this brief, and then returns to *Stewart* in his discussion of the Eleventh Circuit's opinion in section IV.

III. UNDER A PROPER CONSTRUCTION OF 28 U.S.C. § 2244(b) AND 42 U.S.C. § 1983, A FEDERAL COURT DOES NOT INVARIABLY LOSE JURISDICTION TO ENTERTAIN AN OTHERWISE COGNIZABLE § 1983 ACTION SIMPLY BECAUSE THE PLAINTIFF HAS PREVIOUSLY SOUGHT FEDERAL HABEAS CORPUS RELIEF ON UNRELATED GROUNDS.

The decisions of the courts below precluding Mr. Nelson from consideration of the merits of his Eighth Amendment claim in any form of action rest upon a rule extrapolated from 28 U.S.C. § 2244(b) and progressively extended in a series of Eleventh Circuit cases. The rule is that a state prisoner who has unsuccessfully conducted a habeas corpus proceeding challenging his conviction and sentence cannot file a later legal action, however pleaded in law and in fact, challenging anything done to him in the

course of executing that sentence, unless he seeks and receives authorization from the court of appeals to file a "second or successive habeas corpus application" under the largely preclusive standards of § 2244(b).[22] The rule allows for no exceptions in the case of prisoners whose claims in the later legal action *could not* have been presented in their earlier habeas corpus proceeding – because, for example, the events giving rise to the claims had not yet occurred and were not foreseeable at the time of that proceeding. Claims of this kind cannot be raised at all in the Eleventh Circuit because, by definition, they are always either too early or too late.

One would suppose that a result so "seemingly perverse" would not be embraced by a court without some strong anchor in the statutory text. *Stewart*, 523 U.S. at 644. However, there is nothing in the language or the structure of § 2244(b) which remotely suggests that all post-habeas corpus filings are to be construed as successive habeas corpus applications. Nor does the manifest purpose of the statute – to promote finality by forbidding repetitious or dilatory challenges to a state prisoner's conviction or sentence – support the Eleventh Circuit rule deeming claims that could never previously have been

[22] 28 U.S.C. § 2244(b) requires petitioners who seek to file a "second or successive" habeas corpus petition to first obtain leave from the appropriate court of appeals. 28 U.S.C. § 2244(b)(3)(A). *See Felker v. Turpin*, 518 U.S. 651 (1996). Authorization can be obtained only if the petition would raise a new claim and if that new claim relies on a new rule of constitutional law made retroactive to cases on collateral review by this Court or else relies on newly discovered evidence which could not have been discovered earlier through the exercise of due diligence and which would establish the petitioner's innocence of the underlying offense by clear and convincing evidence. 28 U.S.C. § 2244(b)(2).

raised to be the subjects of a "second or successive application."

The Eleventh Circuit began its expansion of this doctrine in *In re Medina*, 109 F.3d 1556 (11th Cir. 1997), when it took the position that, "the provisions of § 2244(b), as amended, operate to foreclose review of competency to be executed claims in second habeas applications," *id.* at 1564, even where such claims could not have been raised in the petitioner's first application. After this Court rejected that position in *Stewart v. Martinez-Villareal*, the Eleventh Circuit continued to bar competency-to-be-executed claims filed after a first habeas corpus application as "successive" unless the unripe claim *was* previously raised in the first petition.[23] *See In re Provenzano*, 215 F.3d 1233 (11th Cir. 2000) (holding that *Medina* forecloses the circuit court from granting a petitioner authorization to file a second habeas corpus petition raising a previously unraised claim of incompetence to be executed).

The Eleventh Circuit has proceeded to extend this rule in a variety of contexts. For example, contrary to most federal circuits,[24] the Eleventh Circuit has announced a

[23] This issue was expressly left open by this Court in *Stewart*, 523 U.S. at 645 n.1.

[24] *See Rodwell v. Pepe*, 324 F.3d 66, 70 (1st Cir. 2003) (Rule 60(b) motion is not automatically a successor under the AEDPA); *Gitten v. United States*, 311 F.3d 529, 530 (2d Cir. 2002) (same); *United States v. Winestock*, 340 F.3d 200, 206-07 (4th Cir. 2003) (same); *Dunn v. Cockrell*, 302 F.3d 491, 492 n.1 (5th Cir. 2002) (per curiam) (same); *Dunlap v. Litscher*, 301 F.3d 873, 875-76 (7th Cir. 2002) (same); *Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002) (same); *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (a bright line rule equating all Rule 60(b) motions with successive habeas corpus petitions would be improper). The Sixth Circuit has similarly held that the requirements

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"bright line rule that the successive-petition restrictions in § 2244(b) apply to *all* Rule 60(b) motions filed by habeas petitioners." *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003) (citation and internal quotations omitted) (emphasis added). *See also Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996) ("[w]e hold that the successive petition restrictions contained in the amendments to § 2244(b) apply to Rule 60(b) proceedings"). In *In re Medina* itself, the court applied the gatekeeping restrictions of § 2244 to bar a Rule 60(b) motion seeking to raise a claim of incompetence to be executed. *Medina*, 109 F.3d at 1561.[25]

Challenges to cruel and unusual punishment brought under § 1983 have been barred uniformly as successive petitions. *See, e.g., Fugate v. Dep't of Corr.*, 301 F.3d 1287 (11th Cir. 2002) (§ 1983 cruel-and-unusual punishment claim challenging lethal injection had to be treated as second habeas corpus application); *Hill v. Hopper*, 112 F.3d

of § 2244 do not automatically apply to every post-habeas corpus filing. *Workman v. Bell*, 227 F.3d 331, 334-35 (6th Cir. 2000) (en banc) (addressing motion to recall mandate, court stated that cases of fraud upon the court are excepted from the requirements of § 2244).

[25] There has been some dissent from the Eleventh Circuit's subjection of all Rule 60(b) motions to § 2244(b) preclusion even "where a Rule 60(b) motion filed by a habeas corpus petitioner is not meant to circumvent 28 U.S.C. § 2244(b), but instead seeks the particular relief which that Federal Rule of Civil Procedure specifically provides." *Mobley v. Head*, 306 F.3d 1096, 1102 (11th Cir. 2002) (Tjoflat, J., dissenting), *hearing en banc pending as ordered by Gonzalez v. Sec'y for Dept. of Corr.*, 326 F.3d 1175 (11th Cir. 2003). Judge Tjoflat opined that "it would be a miscarriage of justice if we turned a blind eye to such abuse of the judicial process" even though the claim would not meet the requirements of § 2244. *Mobley*, 306 F.3d at 1105 (Tjoflat, J., dissenting).

1088 (11th Cir. 1997) (§ 1983 cruel-and-unusual punishment claim challenging electrocution had to be treated as a second habeas corpus application). And in other settings where § 1983 petitioners have sought relief that would not invalidate their conviction or sentence, the Eleventh Circuit has also persistently dubbed the proceeding a banned "second or successive" habeas corpus application. *See, e.g., Gilreath v. State Bd. of Pardons and Paroles*, 273 F.3d 932 (11th Cir. 2001) (barring § 1983 action challenging clemency procedures as successive petition); *Spivey v. State Bd. of Pardons and Paroles*, 279 F.3d 1301 (11th Cir. 2002) (same).

There is no basis in statute, authoritative precedent, or logic for this kind of transmogrification of § 2244(b) into an absolute bar against judicial relief for constitutional violations that are raised in a timely manner for the first time when they first arise and become legally actionable. To the contrary, this Court has consistently rejected the view that § 2244(b) bars consideration of the merits of a ripened constitutional claim that was not adjudicated in a prisoner's prior habeas corpus proceeding, noting that to apply § 2244(b) to such claims would undermine sensible habeas corpus practice. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998); *see also Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)) (holding that a federal habeas corpus petition filed after dismissal of an initial filing because the petitioner had failed to exhaust state remedies should not be deemed a second or successive petition, lest "the complete exhaustion rule" become a "trap" for "the unwary pro se prisoner."). This Court rejected the notion that Congress silently excluded competency-to-be-executed claims from federal habeas corpus review because the prohibition as

"successive" of an entire category of never-previously-raised claims would involve an interpretation of § 2244(b) whose "implications for habeas practice would be far reaching and seemingly perverse." *Stewart*, 523 U.S. at 644. And the same perverseness would have to be imputed to § 2244(b) to construe it as prohibiting federal habeas corpus review of every possible execution-related constitutional claim – however meritorious – simply because such claims *cannot* be raised before they become ripe and will be deemed by Eleventh Circuit logic to be "second or successive" if first raised *after* they become ripe.

IV. WHEN A PREVIOUSLY UNAVAILABLE CLAIM THAT DOES NOT INVALIDATE A CONVICTION OR SENTENCE IS OTHERWISE COGNIZABLE UNDER § 1983 – AS IS MR. NELSON'S – A FEDERAL COURT IS NOT JURISDICTIONALLY BARRED FROM REVIEWING THE CLAIM SIMPLY BECAUSE THE CLAIMANT IS A PRISONER WHO HAS COMPLETED FEDERAL HABEAS CORPUS PROCEEDINGS.

As the State began its preparation for Mr. Nelson's lethal injection, he was informed that he would be subject to the potentially torturous "cut-down" procedure. Counsel ascertained that the law in the Eleventh Circuit foreclosed any access to habeas corpus relief because Mr. Nelson had already completed one federal habeas corpus proceeding. *See In re Provenzano*, 215 F.3d 1233, 1235-36 (11th Cir. 2000), and the similar cases discussed *supra* in section

III.[26] Time being of the essence, counsel sought protection for his client's Eighth Amendment rights through the form of action most likely to proceed quickly through the lower courts: an emergency pleading for relief under 42 U.S.C. § 1983, J.A. 5, with a prayer for "an order granting injunctive relief and staying the Plaintiff's execution." J.A. 22.

Section 1983 is an appropriate vehicle for Mr. Nelson's claim. In terms, it authorizes a "suit in equity, or other proper proceeding for redress" against any person who, under color of state law, "subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Mr. Nelson's invocation of the Eighth Amendment to challenge the State's threatened use of a painful, needlessly invasive and potentially traumatic "cut-down" procedure prior to his execution unquestionably pleads a valid cause of action under 42 U.S.C. § 1983. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The gist of Mr. Nelson's lawsuit was to require the State of Alabama to use some medically appropriate and humane procedure in extinguishing his life. If, as is clear, § 1983 gives a cause of action for an injunction against state correctional officials who persist in maintaining barbaric conditions of confinement, *see, e.g., Hutto v. Finney*, 437 U.S. 678 (1978), it can hardly be thought *not* to give a cause of action for an injunction against state

[26] Counsel's analysis of Eleventh Circuit law was subsequently confirmed by the court of appeals in its opinion below. *Nelson v. Campbell*, 347 F.3d 910, 912 (11th Cir. 2003) (noting that all claims would have been barred under § 2244(b)).

correctional officials who insist on inventing a barbaric method of execution.[27]

Although many claims of constitutional rights or immunities in connection with state criminal process can be raised only by a petition for a writ of habeas corpus, *see Preiser v. Rodriguez*, 411 U.S. 475 (1973), other claims remain squarely within the ambit of § 1983. The decisive question is whether recognition of the claim will necessitate a finding that a state prisoner's underlying conviction or sentence is invalid. If so, then the prisoner must file a

[27] The Civil Rights Act was passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise . . . [the States might deny citizens their] rights, privileges, and immunities guaranteed by the Fourteenth Amendment." *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Services*, 436 U.S. 658 (1978) (municipalities and other local governments are "persons" to whom Civil Rights Act applies). It is precisely this sort of callous indifference that has guided the State's reaction to Mr. Nelson's constitutional concerns throughout. Had there been no federal forum in which Mr. Nelson could seek to hold state officials to constitutional account, it is likely that those officials would never even have given Mr. Nelson any information regarding the potentially torturous procedure devised for his execution. And when they did eventually respond in court by revealing a protocol of the procedure to be used to gain venous access – described in affidavits by Warden Culliver and Dr. Marc Sonnier – this protocol still failed to provide information about the qualifications of the personnel to be performing the procedure or the conditions under which it was to be performed. Worse, as Mr. Nelson's medical expert observed in an affidavit in the district court, the references by both Warden Culliver and Dr. Sonnier to a body part that does not exist, J.A. 99-100, suggest that "Dr. Sonnier is acting under instruction from Mr. Culliver, and that these instructions include specification of technical medical issues that are likely to be beyond the professional training and credentialing of Mr. Culliver." J.A. 100. This performance evinces a shocking level of reckless indifference by state authorities to federal constitutional rights.

habeas corpus petition; the prisoner cannot proceed in a civil action under § 1983. *Preiser*, 411 U.S. at 500 ("when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.").

Conversely, where, as in Mr. Nelson's case, a claim of unconstitutionality is lodged against procedures deployed or threatened under color of state law that are merely auxiliary to the prisoner's conviction and sentence and can be restrained or corrected without impugning the integrity of the underlying conviction and sentence, then § 1983 relief is available. *Wolff v. McDonell*, 418 U.S. 539 (1974) (holding that § 1983 was a permissible avenue of relief when adjudication of a prisoner's claim would not undermine the outcome of disciplinary proceedings); *see also Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (recognizing that state prisoners may seek redress under § 1983 if a judgment in the prisoner's favor would not "necessarily imply" the invalidity of his or her conviction or sentence).

In *Heck*, this Court analyzed both *Preiser* and *Wolff* and made clear where the line between them lies. "Like *Preiser, Wolff* involved a challenge to the procedures used by state prison officials to deprive prisoners of good-time credits. The § 1983 complaint [in *Wolff*] sought restoration of good-time credits as well as 'damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures.'" *Heck*, 512 U.S. at 482 (quoting *Wolff*, 418 U.S. at 553). *Heck* explains *Wolff*'s two-part holding – that the claim for good-time credits was foreclosed by *Preiser* but "the damages claim was nonetheless 'properly before the district court and required

determination of the validity of the procedures employed for imposing sanctions, including loss of good-time,'" *Heck*, 512 U.S. at 482 (quoting *Wolff*, 418 U.S. at 554) – as follows:

> In light of . . . [*Wolff*'s] earlier language characterizing the claim as one of "damages for the deprivation of civil rights," rather than damages for the deprivation of good-time credits, we think this passage recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (*i.e.,* denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiff's continuing confinement.

Heck, 512 U.S. at 482-83.

Mr. Nelson's complaint, like the ones which the Court in *Wolff* and *Heck* held cognizable under § 1983, is precisely that Alabama's prison officials are about to violate his Eighth Amendment rights by "using the wrong procedures" (*i.e.*, unnecessarily torturous ones) *not* that those procedures will produce "the wrong result" (*i.e.*, his death.) Mr. Nelson does not contest the State's right to execute him; he seeks only that the execution be performed humanely. As he has repeatedly stated throughout this § 1983 lawsuit, he does not challenge the State's legal authority to execute him or the constitutionality of his sentence. J.A. 69-70. He challenges nothing more than the gratuitous infliction of pain and avoidable suffering that the State's proposed "cut-down" procedure will entail. Since this violation of the Eighth Amendment can and should be remedied without calling into question in any

way the validity of his underlying conviction or sentence, he may challenge it in a civil rights injunctive suit under § 1983 under the square holding of *Wolff* and the explicit analysis in *Heck*.[28]

Similarly, because Mr. Nelson has not challenged the lawfulness of his sentence or the State's entitlement to execute him humanely, his § 1983 action to restrain the State from performing an unconstitutionally torturous "cut-down" procedure prior to his execution cannot be fairly regarded as an attempt to "circumvent the rules regarding second or successive habeas petitions." *Nelson v. Campbell*, 347 F.3d at 911. Although he requested a preliminary injunctive order staying his execution – a point the Eleventh Circuit Court of Appeals thought

[28] Circuit courts elsewhere than in the Eleventh Circuit have followed *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) – which addressed Ohio's clemency procedures in a § 1983 action brought by a death row inmate – in recognizing the legitimacy of § 1983 suits as a vehicle for condemned inmates (including those who have completed federal habeas corpus proceedings) to challenge a State's deprivation of the "minimal" procedural due process rights vouchsafed by *Woodard* in clemency proceedings, *id.* at 289. *See Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000) (granting stay of execution to permit the district court to consider the validity of a challenge to improper state interference in clemency proceedings); *Duvall v. Keating*, 162 F.3d 1058 (10th Cir. 1998) (upholding a district court's denial on the merits of a death row prisoner's request for a temporary restraining order filed in conjunction with a challenge to clemency procedures while recognizing the legitimacy of § 1983 generally); *Wilson v. United States Dist. Court for the N. Dist. of California*, 161 F.3d 1185 (9th Cir. 1998) (rejecting state's challenge to a district court's grant of a temporary restraining order staying an execution in a challenge to clemency procedures). *Contra*, *Spivey v. State Bd. of Pardons and Paroles*, 279 F.3d 1301 (11th Cir. 2002) (holding that a § 1983 complaint challenging the propriety of clemency proceedings must be recharacterized as a successive habeas corpus application).

particularly significant, *see id.* at n.4, this request was necessitated solely by the insistence of state officials upon their chosen "cut-down" technique for acquiring venous access, and was not aimed at halting or delaying the execution itself. Even after Mr. Nelson filed his complaint alleging a violation of the Eighth Amendment and seeking a stay, the State had the opportunity to ensure that his execution would proceed on schedule by adopting any procedure for gaining access to his veins that comported with contemporary medical standards for avoiding needless agony and the risk of "medical misadventure and a botched outcome." J.A. 33. However, the State declined the district judge's request to consider "a procedure that would be acceptable to both sides," J.A. 73, and thus required that the stay be sought which was eventually granted by this Court.

The stay is, of course, temporary; and that is as Mr. Nelson wishes it to be. For if, in the end, he is permitted to proceed in federal court and there obtains a favorable adjudication of his Eighth Amendment claim, the immediate result will be to let the State execute him and thus accomplish its ultimate objective as well. Under these circumstances it is demonstrably incorrect to say, as the court of appeals below did, that "Nelson's prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot [properly] be accomplished by a successive petition for habeas corpus." *Nelson*, 347 F.3d at 913 n.4. What is "directly imped[ing] the implementation of the state sentence," *id.*, in Mr. Nelson's case, and has impeded it from the outset, is Warden Culliver's adamant insistence on a needlessly torturous way of

accomplishing the fatal result that both Mr. Nelson and the State of Alabama want to see promptly accomplished.

V. IF RECHARACTERIZATION OF MR. NELSON'S § 1983 COMPLAINT IS PROPER, THE COMPLAINT SHOULD BE ENTERTAINED AS A FEDERAL HABEAS CORPUS PETITION BY THE DISTRICT COURT WITH NO NEED FOR PRIOR AUTHORIZATION BY THE COURT OF APPEALS BECAUSE IT IS NOT A SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATION WITHIN THE MEANING OF 28 U.S.C. § 2244(b).

As we have said above, and as Mr. Nelson explicitly told both courts below, he seeks only an adjudication of his claim that Alabama's proposed "cut-down" procedure would violate his Eighth Amendment right against cruel and unusual punishment. Such a claim could not have been presented in his previous federal habeas corpus proceeding because it was premature when that proceeding was maintained and finally adjudicated. Indeed, throughout the period of that proceeding, the State of Alabama executed death sentences by electrocution, not by lethal injection. It is not difficult to imagine what sort of ruling the federal habeas court at that time would have rendered if Mr. Nelson had undertaken to challenge any potential secondary procedure that might become necessary if and when Alabama subsequently elected to replace electrocution with lethal injection – or with the gas chamber, hanging, or whatever other new methods of execution the future could bring. The challenge would unquestionably have been viewed by the courts as ridiculously premature. For that reason, 28 U.S.C. § 2244(b) erects no bar to Mr. Nelson's presentation of the claim in a habeas corpus

petition after the legal and factual grounds for the challenge did mature. *Stewart v. Martinez-Villareal* squarely so holds. And this result is eminently correct, for nothing in § 2244(b) remotely implies any congressional intent to foreclose all avenues of relief for a death-sentenced prisoner who seeks legal redress against an unconstitutional execution procedure which became known – indeed, which was first devised – only after his or her federal habeas corpus proceedings had been concluded.

David Nelson's fundamental entitlement to present his claim should not depend, we believe, upon the mechanism of his request – a § 1983 action – however proper that mechanism is (as we have shown it to be above), but rather on the substance of that claim. If this Court deems some other vehicle more appropriate, Mr. Nelson requests that the Court permit him to pursue that remedy. If the Court sees any reason why his § 1983 complaint should be recharacterized as a habeas corpus application, it would nonetheless not be a "second or successive" application for the writ according to *Stewart*. Hence, Mr. Nelson should be entitled to pursue it in the district court without "gatekeeper" authorization under 28 U.S.C. § 2244(b)(3).

CONCLUSION

The judgment of the Eleventh Circuit Court of Appeals should be reversed and the case remanded to permit Mr. Nelson to present the merits of his Eighth Amendment claim to the district court.

Respectfully submitted,

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46